IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 47 OF 2002.

Shri Govind Pawar,
son of Gopal Pawar,
mechanic helper,
major in age,
resident of House
No.74, Novawado,
Sacorda, Sanguem, Goa. ... Appellant.

VERSUS

S T A T E,
(Through the Public
Prosecutor). ... Respondent.

Mr. S. S. Kakodkar, Advocate for the Appellant.

Mr. S. N. Sardessai, Public Prosecutor for the State/Respondent.

CORAM: D. G. DESHPANDE, J.

DATE: 30TH JANUARY, 2003.

ORAL JUDGMENT:

Heard the Advocate for the Accused and the Public Prosecutor for the State.

2. The accused in this case is convicted by the Sessions Judge, South Goa, Margao by his Judgment dated 31st July, 2002 under Section 376(2)(f) of I.P.C. and sentenced to suffer R.I. for seven years and to pay a fine of Rs.5,000/-, in default to undergo S.I. for one year.

3. The case of the prosecution in short was that on 2.1.2001 at about 9.30 hours, at Nawawada, Sacorda in the morning, the accused called Ms. Dipali Naik, aged 7 years who was his neighbour to his house on the pretext of giving her 'khajem' i.e. some sweets and thereafter he had forcible sexual intercourse with her. F.I.R. was lodged by Pratiksha Naik, mother of Dipali on the same day at about 13.15 hours. Dipali and the accused were both sent for medical examination. Both of them were examined by Dr. Rodrigues. Thereafter investigation was done which included panchanama, seizure of clothes, preparation of sketch map and charge sheet came to be filed. Exhibits were sent to the Forensic Laboratory and report was received.

4. Prosecution examined the mother of the victim as P.W.1, P.W.2 Dipali, the victim herself, P.W.3 panch on the panchanama of the scene of offence, P.W.4 Dr. J. Rodrigues who examined the accused as well as the victim girl, P.W.5 as a witness corroborating the statement of witness Pratiksha, P.W.6 the neighbour of Pratiksha, another panch witness Rajan Virnodkar and other witnesses.

5. The defence of the accused was of total denial and false implication in the case. But the

Sessions Court accepted the case of the prosecution and rejected the defence of the accused. Hence this appeal.

6. According to the counsel for the accused, the entire case of the prosecution is highly improbable and therefore false and secondly, according to him the case of the prosecution about forcible sexual intercourse by the accused with Dipali, is not supported by the medical evidence. He also contends that the evidence of P.W.1 and of the victim girl were full of omissions and contradictions on material particulars and therefore the accused was entitled for acquittal.

7. On the other hand, learned P.P. contended that none of the submissions made by the counsel for the accused were supported by record. He contended that there was no reason for P.W.1 to falsely implicate the accused in such a heinous crime. Secondly, F.I.R. was lodged promptly without any delay and thirdly, the conduct of the accused and his acquaintance with the family of the victim clearly shows that the accused was a man of confidence and he has taken advantage of his position and raped a minor girl and the Trial Court rightly convicted the accused and therefore no interference

was called for.

8. Since the main thrust of the argument of the counsel for the accused was on the medical evidence, it would be better to look into the said evidence and consider the same.

9. Prosecution has examined Dr. Rodrigues as P.W.4. He has stated that on 2nd January, 2001 he examined Dipali and issued certificate (Exh.24). He examined Dipali with history of removing nicker, laying her on the ground and thrusting of penis. There was also a history of pain in the act of sexual assault. He has further stated that on examination, he found that there were no injuries on the body. Both the hands finger nails were deeply cut. Her gait was normal. Her genital development was infantile. Pubic hair had not erupted. There were no injuries on the inner aspect of thighs. There was soreness, bruising and edema around urethra and hymenal opening with tenderness on examination.

10. P.W.4 further stated that hymenal opening barely admitted tip of little finger. The hymenal opening was edematous and tender. There were no fresh or old tears to hymen. Vaginal walls and vaginal contents were normal. The victim girl was

frightened and withdrawn. Vaginal swabs and vaginal smear slides were retained and in his opinion there was evidence of recent forcible vulval penetration and there was no evidence of recent forcible sexual intercourse.

11. The Doctor further stated that based on clinical history and his findings, he was of the opinion that the injuries mentioned in column no.4 of his Report were caused due to a hard blunt stiff object like erected penis which was forcibly thrusted into the narrow vagina of a young female victim like Depali.

12. P.W.4 also examined the accused on 3rd January 2001 and on physical examination he found that there was nothing to suggest that the accused was not capable of sexual intercourse. The report of P.W.4 regarding Depali is Exh.24 and the report regarding examination of the accused is Exh.27.

13. Counsel for the accused vehemently urged that when the Doctor (P.W.4) has specifically stated before the Court and as mentioned in Exh.24 that there was no evidence of recent forcible sexual intercourse, then the accused could not be convicted under Section 376 I.P.C. The learned Public

Prosecutor on the other hand, contended that upon examination of Depali, the Doctor found soreness, bruises and edema around urethra and hymenal opening with tenderness; that the victim girl was withdrawn and frightened and there was evidence of recent forcible vulval penetration. This evidence of the Doctor and his opinion given in the certificate coupled with the oral evidence of Depali was sufficient to come to the conclusion that the accused has committed forcible rape on Depali.

14. At this juncture, it is necessary to consider the evidence of P.Ws.1 and 2. P.W.1 has stated that the accused was her neighbour. He was addressing her as 'Mami' i.e. mother and accused told P.W.1 that he has brought khajem for Depali and therefore she should send Depali to his house to collect khajem. Thereafter Depali told P.W.1 that she would not go to the house of accused because he has misbehaved with her earlier also i.e. on the occasion of Ganesh Chaturthi. The accused had touched her private parts to his in standing position.

15. Thereafter P.W.1 states that she pinched Depali and asked her to go to the house of the accused and to tell her if at all something happens.

She also assured Depali that she should come in case the accused behaved in that manner and Depali would should also call Laximi the other neighbour for that purpose.

16. According to P.W.1 thereafter Depali went with the accused to his house to bring khajem. Then P.W.1 dressed her son to reach him to Balwadi which is close to the house of the accused. Then she went to the house of the accused. She called out to Depali four or five times, then entered the house. She saw the brother of the accused sleeping in the entrance room. She directly went to the kitchen and found that the accused had made Depali sleep on the ground. Her underwear was on the grinding stone. She saw the frock of Dipali lifted up and the accused with his pants lowered was trying to have sex with Dipali. He was inserting his private part into that of Dipali. Then Depali called out 'Atem' for Laximi. Thereupon P.W.1 questioned the accused, but he kept quiet and P.W.1 told the accused that she was not going to remain quiet and was going to complain to the Panchayat.

17. Thereafter she told Vinayak the brother of the accused as to what had happened and Vinayak told her to lodge a complaint with the Police. She

went to the Panchayat to see the Sarpanch, but the Sarpanch was not there and as the Secretary was new she did not tell him anything out of shyness. However, in the Panchayat she met one Vincent who was a linesman and who was her neighbour. He saw both of them crying and therefore P.W.1 narrated as to what happened. Thereafter she went to the Police Station and lodged the report and Depali was sent for medical examination.

18. This is in short the evidence of P.W.1. So far as this evidence is concerned, counsel for the accused contended that there are number of contradictions and omissions in the evidence of P.W.1 and therefore her evidence was liable to be disbelieved.

19. The cross-examination of P.W.1 is running into 8 to 9 pages and it is not necessary to reproduce the entire evidence to appreciate the submissions of the Advocate for the accused. So far as the omissions are concerned, they are all pertaining to minor aspects of the matter, for e.g. she did not tell the Police that herself and her three children were at home. She has not told the Police that the accused was standing in the sun. She did not tell the Police that the accused was calling

her 'mummy' (ulo marlo) and told to send Munna (referring to her daughter). There are further contradictions about whether she asked her daughter to go to the house and take khajem without entering the house. Then about her going to the house of the accused and calling Depali and about seeing her nicker on the grinding stone. It will be clear that all these and other so called omissions and contradictions are minor. They do not affect the veracity of the witness. In the entire cross-examination there is nothing to suggest as to why this P.W.1 who was neighbour of the accused and to whom the accused was addressing as 'Mummy' should file such a false complaint. Immediate lodging of the report before narrating the incident to the linesman Vincent gives strong credence to the testimony of P.W.1. Her testimony was rightly accepted by the Court. So far as P.W.2 is concerned, her evidence is fully consistent with that of P.W.1 so far as the neighbourhood of the accused, their acquaintance, the accused calling Depali on the pretext of taking khajem are concerned. Depali has also stated that she refused and avoided to go with the accused, but the mother pursuaded her. Thereafter she has narrated the manner in which the accused had sexual intercourse with her. She also stated that she started getting pain. She therefore

cried out "ai, ai", but the accused took out her frock and tied her mouth and at that time her mother came.

20. In the cross examination of this child witness, also nothing fruitful could be brought out. There is detailed cross-examination about the part of sexual intercourse, but even then the accused has failed to dislodge the witness.

21. The story of P.Ws.1 and 2 is fully supported by the electrician P.W.5 Vincent.

22. Counsel for the accused relied upon the judgements of this Court in **Vishnu s/o Parmeshwar Yadav and others v. State of Maharashtra,** reported **in** 1997 Cri. L.J., 1724, wherein in para 28 of the said judgment the Court gave certain circumstances which create doubt about the theory of sexual intercourse. They are as under :-

" (i) Complete absence of evidence as to what transpired at Allahabad and at Patna.

(ii) The tender age of the prosecutrix which was only 14 years and 8 months as per the parents' version and, therefore, she probably being unable to know what the sexual intercourse was.

(iii) Apathy on the part of the prosecuting agency to get the term explained by the prosecutrix and the absence of the actual evidence of penetration

in the oral testimony of the prosecutrix.

(iv) Apathy on the part of the investigating agency to place the reply to the requisition Exhibit 24 on record, if there was any.

(v) Non-examination of the concerned doctor at the trial.

(vi) Finding in the medical certificate that the hymen of the prosecutrix was intact and there were no signs of any physical violence; and

(vii) Last, but not the least, the opinion expressed in the medical certificate to the effect that it could not be said as to whether the rape has taken place or not. "

23. Counsel for the accused therefore contended that in the instant case the medical evidence does not support the theory of rape and therefore basing the aforesaid judgment, squarely applies to the facts of the present case.

24. Reliance was also placed by the Advocate for the Accused on the judgment of this Court in **Prakash s/o. Sakharam Mandale v. The State of Maharashtra and others,** reported in 1997 Cri. L.J., 4199, wherein in para 16, the Court observed:-

" In rape cases, the medical evidence of the accused and prosecutrix assumes importance to ascertain as to whether there was sexual intercourse or assault on the victim. In many cases, examination of the prosecutrix victim does not help the court to ascertain the sexual assault as the woman is habituated to the intercourse then in that case, the medical examiner should examine the prosecutrix to find out the symptoms of (1) marks of violence near genitals, (2) marks of violence on the body, (3) Gonorrhoeal infection, (4) Blood and seminal stains,

(5) presence of spermatozoa in vagina and (6) rupture of hymen. In the instant case admittedly except that there was rupture of hymen none other symptoms could be noticed. "

25. The counsel for the accused therefore contended that this decision also helps the accused and since there is no medical evidence, the accused is entitled for acquittal.

26. I am in disagreement with the contentions of the Advocate for the Accused. So far as the judgment of this Court in 1997 Cri.L.J., 1724 is concerned, the factors which were considered in para 28 of the said judgment apply to the facts of that case. P.Ws.1 and 2 have given clear-cut evidence of the happenings and the sequence in which the incident took place. P.W.2 Depali Naik though she was of tender age of 7 years, understood what had happened and her evidence is clear. The incident was witnessed by the mother which rarely happens in rape cases. Further the judgment of the second case reported in 1997 Cri.L.J., 4199 is also of no use because in the instant case the Doctor noticed all the injuries to the private parts and surrounding area of Depali. He also justified that there was vulval penetration and he found bruises and swelling and other injuries and as discussed above if this evidence is taken together with the evidence of P.Ws.1 and 2 it would lead to the conclusion that the

accused has raped the victim. Even otherwise, everything depends upon the nature of the evidence led by the victim. If the evidence of the victim inspires confidence and is corroborated by other evidence, then the trial Court was rightly justified in accepting that evidence and convicting the accused.

27. Lastly, it was submitted by the counsel for the accused that looking to the age of the accused, the sentence of seven years should be reduced. However, that aspect has been considered by the Trial Court and by recording special reasons, the Trial Court has imposed a sentence of 7 years.

28. No further reduction is called for in this case and for all these reasons, the Appeal stands dismissed.

D. G. DESHPANDE, J.

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